BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Implementation of Sections 3(n) and 332 of the Communications Act	GEN Docket No. 93-252
Regulatory Treatment of Mobile Services	

PETITION FOR RECONSIDERATION AND CLARIFICATION OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

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Pursuant to Sections 1.49, 1.52, 1.415, 1.419, and 1.429 of the Federal Communications Commission's ("FCC" or "Commission") Rules of Practice and Procedure,[1] the National Association of Regulatory Utility Commissioners ("NARUC") respectfully submits the following request for reconsideration of certain aspects of the Commission's April 19, 1994 noticed[2] "Second Report and Order" ("2nd R&O" or "Order") [FCC 94-31], as adopted February 3, 1994, and released March 7, 1994, in the above-captioned proceeding.

In support of this request, NARUC states as follows:

I. BACKGROUND

A. The Omnibus Budget Reconciliation Act of 1993.

On August 10, 1993, President Clinton signed into law Title VI, § 6002(b) of the Omnibus Budget Reconciliation Act of 1993 ("Budget Act").[3] That Section amends § 3(n) and § 332 of the

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[1] 47 C.F.R. §§ 1.49, 1.52, 1.415, 1.419, and 1.429 (1993).

[2] 59 Federal Register 18493 (April 19, 1994).

[3] Pub. L. No. 103-66, Title VI, § 6002(b), 107 Stat. 312, 392 (1993).

Communications Act of 1934 ("Act"), to create a comprehensive framework for the regulation of mobile radio services, including existing common carrier mobile services, private land mobile services, and future services such as Personal Communications Services. Under revised Section 332, which previously governed private land mobile service, mobile services are classified as either "commercial mobile service" ("CMRS") or "private mobile service" ("PMRS"). CMRS providers are treated as common carriers under the Act, except that the FCC may exempt them from provisions of Title II other than Sections 201, 202, and 208. PMRS is not subject to any common carrier regulation.

Revised Section 332(c)(3) preempts State and local rate and entry regulation of both commercial and private mobile service, but allows States to regulate other terms and conditions of commercial mobile service. In addition, states may petition for authority to regulate commercial mobile service rates under circumstances specified by statute.

B. The FCC Notice of Proposed Rulemaking.

On September 23, 1993, the FCC adopted a Notice of Proposed Rule Making, FCC Rcd 7988 (1993) ("NPRM"), in this proceeding. The NPRM sought comment on (a) definitional issues raised by the Budget Act, (b) classification of existing and future mobile services, and (c) which Title II sections should not be applied to CMRS. The FCC received 76 initial and 52 reply comments on the NPRM.

C. The FCC's March Second Report and Order.

The March order reflects the Commission's efforts to implement the congressional intent of creating regulatory symmetry among similar mobile services. The order defines CMRS and PMRS and classifies existing services. For CMRS providers, the order states that the FCC will not impose any tariff obligations or market entry or exit requirements and will forbear from several aspects of its Title II authority.

As far as the States are concerned, the Order preempts State regulation of the right and type of LEC interconnection for CMRS/PMRS, notes that State and local rate and entry regulation is preempted, and also finds that States can petition for continuation of, or brand new, rate authority by meeting a stiff burden of proof concerning the need for oversight.

II. RECONSIDERATION AND CLARIFICATION REQUESTS

In accordance with 1.429(c), NARUC respectfully requests that the FCC:

- Eliminate the requirement to submit detailed CMRS rate regulation rules for States applying to reassert rate authority.

- Clarify that the FCC has not yet acted to preempt State regulation of CMRS interconnection rates and that ALL CMRS interconnection issues, including preemption, can be raised in the posed notice of inquiry. Alternatively, we respectfully request the Commission reconsider its "agreement" that States are preempted from regulating CMRS interconnection rates.

III. DISCUSSION

A. The 47 C.F.R. § 20.13 (a)(2)(4) requirement for States petitioning for CMRS rate authority to "...identify and describe in detail the rules..." is inappropriate from both a legal and policy perspective.

1. The § 20.13(c) requirement exceeds Congressional intent.

a. The FCC's interpretation ignores the plain language of the Act.

In the Order, at ¶ 252, mimeo at 95, the Commission states:

> In addition to the above-described evidence, information, and analysis that a state may submit in connection with its petition, we conclude that a state must identify and provide a detailed description of the specific existing or proposed rules that i would establish if we were to grant its petition.

The FCC codified this mandate in new section 20.13(a)(2)(4).

Earlier, in ¶ 250, mimeo at 94, the Commission notes its agreement that:

> ...Section 332(c)(3) is clear as to the circumstances under which states may be permitted to petition the Commission for authority to regulate rates for CMRS and the criteria upon which they must base their petitions."

We agree. The plain text of the statute is clear and very detailed. Nowhere in Section 332 does it say anything about a State's proposed mode of regulation. The §23.13(c) requirement exceeds the rather explicit statutory mandate, which speaks ONLY in terms of POTENTIAL CONSUMER IMPACTS" [4] Indeed, a review of the text of the statute reveals that Congress recognized that the potential FORM of state regulation has nothing at all to do with whether the NEED for regulation exists. Hence the explicit showing States are required

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[4] See 47 USCA § 332 - "if such State demonstrates that -- (i) market conditions with respect to such service fail to protect subscribers adequately from unjust or unreasonable rates..."

to make to the FCC is tightly focused on need for oversight, e.g., are "market conditions...fail[ing] to protect subscribers"?, etc.

b. The FCC interpretation ignores the obvious implications of the very specific parallel construct framed in §332(c)(1).

All of § 332 is quite precise about the showings that are required and the procedures the FCC is to follow. For example, in the parallel construct for the FCC contained in the same subpart (c), Congress also listed required findings focused on whether a particular regulation is NEEDED. However, § 332(c)(1)(A)-(C), also very specifically requires examination of the likely impact of a particular regulation. The clear implication to be drawn from this is that if Congress had wanted the FCC to examine a State's regulations, it would have said so. It certainly did not hesitate to require the FCC to consider the specific provisions of both existing and "proposed regulations."

c. Congress set definite time frames for FCC action in §332 to assure needed consumers protections would not be unnecessarily delayed. This clear desire for speedy action, when warranted, is thwarted by inclusion of this section.

As is clear from the timetables established in the Act, Congress wanted to be sure that proceedings to determine if consumers need protection not be unnecessarily delayed. As discussed in more detail, infra, §20.13(c) essentially requires States to, at least prepare a notice of proposed rulemaking, and, more likely, complete rulemaking proceedings before even filing a petition asking the Commission to provide consumers with needed rate relief. Depending on the jurisdiction involved, such

proceedings, particularly with the assured "full participation" of the particular affected CMRS providers, could drag out for well over a year adding significantly to the time needed to make application, and also to the time needed to give consumers relief. This will occur EVEN IF EVIDENCE OF UNJUST AND UNREASONABLE RATES AND THE LEVEL OF CONSUMER ABUSE IS BEYOND DISPUTE. Clearly, this is not what Congress intended. Note, however, that having the rulemaking proceedings after the FCC has approved State rate authority does not forestall consumer protection benefits. Obviously, without FCC approved rate authority, CMRS providers will argue that State commissions cannot order rate freezes and/or refund requirements during the pendency of any rulemaking proceedings. This argument is not available once rate approval has been granted.

2. The § 20.13(c) requirement is bad policy.

a. §20.13(c) requires States to divert scarce resources to establishing rules that could never be used.

A requirement for States to describe in detail the rules that would be imposed is counter-productive. First, at a minimum, scare staff resources would have to be diverted to drafting up detailed rules. Apparently, the least the staff would have to do, before a petition could be filed, is to prepare a proposed rulemaking.[5]

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[5] It is not clear exactly how the FCC would be using these regulations to determine if the States make the appropriate showing concerning market conditions. In any case, mere proposed rules would be of limited utility. Whatever decision the FCC based on proposed rules would be suspect because, as the FCC well knows, all to often, proposed rules bear little resemblance to the final product.

More likely, States would end up embroiled in rulemaking proceedings.

b. §20.13(c) requires additional delay.

As discussed, supra, regardless of whether a full blown rulemaking is involved or just the drafting of a detailed set of proposed rules, a significant and unwarranted delay in the FCC application process is the result. To the extent the FCC ultimately agrees that reimposition of state rate authority is required, consumers will be unnecessarily injured.

B. The FCC should clarify that the Order does not preempt State regulation of CMRS interconnection rates and that ALL CMRS interconnection issues, including preemption, may be raised in the proposed notice of inquiry. Alternatively, the Commission should reconsider its determination.

In ¶ 237 of the Order, the FCC discussed whether CMRS providers should be required to provide interconnection to other carriers. Specifically, the FCC noted:

> Because the comments on this issue are so conflicting and the complexities of the issue warrant further examination in the record, we have decided to explore this issue in a Notice of Inquiry. This proceeding will address many of the related issues raised by commentors.

Then, the Order goes on to note:

> "We agree, however, with commentors who say that the statutory language is clear, that if we do require interconnection by all CMRS providers, the statute preempts state regulation of interconnection rates of CMRS providers."

As the FCC has clearly stated its intent to act, if at all, in a future proceeding to, inter alia, preempt State regulation over intrastate CMRS interconnection rates, it does not appear that its "agreement with commentors" is ripe for reconsideration, much less appeal. However, prudence requires that NARUC seek clarification of

this section to avoid potentially compromising our procedural rights to appeal any such subsequent Commission determination to preempt. Accordingly, we request that the Commission clarify that peremption remains one of the issues that can be addressed in the proposed notice of inquiry.

As noted in our earlier comments, NARUC contends that the proposed preemption cannot be supported.[6] A review of the legislative history of the Budget Act, and the tests provided for States to re-enter/continue rate regulation, clarifies that Congress intended the preemptive effects of that legislation to apply only to rates charged consumer end-users of such services. From a policy perspective, given the Congressional acknowledgment that CMRS services are expected to compete with existing landline and wireless services, it makes little sense to assume authority over CMRS interconnection tariffs is preempted while States retain the clear right to regulate CMRS interconnection with LECs.

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[6] States are vested, pursuant to 47 U.S.C.A. § 152(b) with exclusive power of intrastate rates regardless of the type of rate unless Congress has acted to limit that authority. Clearly, it has not done so here. Compare, Louisiana Public Service Commission v. FCC, 476 U.S 355, 368, 375 (1986); 47 U.S.C.A. § 201; and In the Matter of the Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, report No. CL-379, 2 FCC Rcd. 2910 (1987) at ¶ 8.

IV. CONCLUSION

In light of the foregoing, NARUC respectfully requests that the Commission (i) eliminate the requirement to submit detailed CMRS rate regulation rules for States applying to reassert rate authority, and (ii) clarify that ALL CMRS interconnection issues, including preemption, can be raised in the posed notice of inquiry.

Respectfully submitted,

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